No. 77-1116

In the

Supreme Court of the United States

OCTOBER TERM, 1977

THE TORO COMPANY and
TORO SALES COMPANY,

Petitioners,

vs.

THE HONORABLE DONALD D. ALSOP, DISTRICT JUDGE,
BALLAS LIQUIDATING COMPANY,
and WEED EATER, INC.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

JOHN W. HOFELDT
ROBERT V. JAMBOR
55 East Monroe Street
Suite 3614
Chicago, Illinois 60603

EUGENE M. WARLICH
ALAN I. SILVER
E-1500 First National Bank Bldg.
Saint Paul, Minnesota 55101
Counsel for Petitioner.

The Scheffer Press, Inc.—(312) 263-6350

TABLE OF CONTENTS

Cases Cited

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

No.

THE TORO COMPANY and
TORO SALES COMPANY,

Petitioners,

vs.

THE HONORABLE DONALD D. ALSOP, DISTRICT JUDGE,
BALLAS LIQUIDATING COMPANY,
and WEED EATER, INC.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITION

The petitioners, The Toro Company and Toro Sales Company, respectfully pray that a Writ of Certiorari issue to review the Opinion of the United States Court of Appeals for the Eighth Circuit filed in this cause on November 10, 1977, denying petitioners' Petition for Writ of Mandamus.

OPINIONS BELOW

Neither the opinion of the Court of Appeals nor the Order of the District Court for the District of Minnesota, Fourth Division, to which Petitioners' Petition for Writ of Mandamus was directed, are reported. Each is appended hereto, as is the decision of the District Court denying Petitioners' request for certification pursuant to 28 U.S.C. § 1292(b).

JURISDICTION

The decision of the Court of Appeals for the Eighth Circuit was filed on November 10, 1977, and this Petition was filed within ninety days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

First Question

Does Section 1404(a) of Title 28 U.S.C. grant judicial power to transfer civil actions solely on the postulate that judicial effort might be conserved?

Second Question

Does Section 1404(a) of Title 28 U.S.C. grant judicial power to contravene the convenience of parties and witnesses purportedly to serve the interests of justice through conservation of judicial resources?

Third Question

Do Section 1404(a) of Title 28 U.S.C. and Rule 21 F.R.C.P. grant judicial power to force piecemeal and potentially duplicative litigation in separate jurisdictions through severance of some of multiple claims having common issues asserted against one party and transfer of those claims to another district?

STATUTORY PROVISIONS AND RULES INVOLVED

United States Code, Title 28,

§ 1404(a), Change of Venue:
"For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought."

Federal Rules of Civil Procedure,

Rule 21, Misjoinder and Non-Joinder of Parties:
"Misjoinder of parties is not ground for dismissal of an action. Parties may be dropped or added by order of the court on motion of any party or of its own initiative at any stage of the action and on such terms as are just. Any claim against a party may be severed and proceeded with separately."

Rule 42(b), Separate Trials:
"The Court, in furtherance of convenience or to avoid prejudice, or when separate trials will be conducive to expedition and economy, may order a separate trial of any claim, cross-claim, counterclaim, or third-party claim, or of any separate issue or of any number of claims, cross-claims, counterclaims, third-party claims, or issues, always preserving inviolate the right of trial by jury as declared by the Seventh Amendment to the Constitution or as given by a statute of the United States."

STATEMENT OF THE CASE

The Second Amended Complaint of Petitioners, asserts four claims against Respondents, Ballas Liquidating Company and Weed Eater, Inc. The first three counts charge violations of the Federal anti-trust laws. Counts One and Two allege unlawful and coercive conduct in the marketing of filament type trimmers for trimming vegetation, such devices are allegedly covered by patents previously owned

by Ballas Liquidating Company and assigned to Weed Eater, Inc.

The unlawful and coercive conduct alleged by Counts One and Two, includes unlawful dealer termination, concerted refusals to deal and boycotting, territorial confinement of distributors and, as a part of such practices, the fraudulent procurement and illegal misuse of patents.

Count Four seeks a declaration of invalidity and unenforceability of the patents involved in the unlawful restraints and monopolization alleged in Counts One and Two. Fraudulent procurement is raised as a basis of invalidity. The use of the patents as part of the coercive and illegal trade practices alleged in Count One and their use and attempted use as alleged in Count Two to establish and enforce a monopoly not created or permitted by the Patent Laws of the United States and in violation of the antitrust laws is raised as the basis of unenforceability.

On May 6, 1977, Respondent, Weed Eater, Inc., initiated identical actions against Petitioners in the District Court for the Central District of California and the District Court for the District of Kansas charging infringement of its patents relating to filament type trimmers.* This precipitated Petitioners' assertion of additional claims of anti-trust violation based upon illegal procurement and misuse of patents and its request for declaratory relief directed to the validity and enforceability of Respondent's patents.**

---

* The California action was voluntarily dismissed. The District Court in Kansas, entered an order of dismissal, with the assent of Respondent, Weed Eater, Inc., based on lack of proper venue pursuant to Title 28 U.S.C. § 1404(b).

** Immediately thereafter Respondent initiated a third identical infringement action in the District Court for the Western District of Wisconsin which remains pending.

In this action, Weed Eater, Inc. moved for an order pursuant to Section 1404(a) of 28 U.S.C. severing and transferring Count Four of the Second Amended Complaint and a "conditional" Counterclaim Complaint to the District of Kansas.

The primary basis urged for transfer was the pendency there of an action brought by the Ballas Liquidating Company charging infringement of the patents now owned by Weed Eater, Inc. (*Weed Eater, Inc.* v. *Allied Industries of Kansas, Inc.,* Civil Action 75-146-C2, filed July 11, 1975).

In the Memorandum Order of July 15, 1977, The Honorable Donald D. Alsop, construing Count Four as seeking only a declaratory judgment of the invalidity of the patents, ordered the requested severance and transfer, (Appendix p. 12a).* Significantly, the ordered severance separates Petitioners' affirmative claim in Counts One and Two of antitrust violation through illegal and coercive use of its patents from Petitioners' claim in Count Four for a declaration of unenforceability based upon those same illegal activities.

The Order reflects no consideration having been given to the convenience of the parties and witnesses save for the assertion that "it is quite possible that the parties will obtain an earlier trial date in the United States District Court for the District of Kansas" (Appendix p. 13a). No proofs or opinion evidence were presented on that issue. Nor was that point raised in argument.

Petitioners are Minnesota corporations with their principal place of business in Minnesota. Respondent, Weed

---

* This incorrect interpretation ignored unenforceability which is even more closely entwined with the first three counts.

Eater, Inc., has admitted "three is no doubt that Minneapolis is more convenient for Plaintiffs, Toro and Toro Sales." Respondents are Delaware corporations with a principal place of business in Texas.

Petitioners moved the District Court for an order under 28 U.S.C. § 1292(b) permitting an interlocutory appeal. The motion was denied.

Petitioners then petitioned the Court of Appeals for the Eighth Circuit for a Writ of Mandamus directing the District Court to set aside the transfer order. That petition was denied on November 10, 1977.

This Petition was filed on February 8, 1978.

REASONS FOR GRANTING THE WRIT

I. The Requirements of Title 28 U.S.C. § 1404(a) Pertaining to Transfer of Civil Actions are Jurisdictional

Section 1404(a) of the Judicial Code, Title 28, provides:

> "For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought."

The necessity of strict adherence to these statutory requirements was expressed by this Court in *Hoffman* v. *Blaski*, 363 U.S. 335, 1960. It is there stated:

> ". . . The transferee courts could have acquired jurisdiction over these actions only if properly brought in those courts, *or if validly transferred thereto under* § 1404(a)." (Emphasis supplied) (p. 343)

The need for due consideration and consistent application of each of the conditions set forth in the statute is clear. The court to which a civil action has been improperly transferred is without jurisdiction. Any resultant proceeding constitutes a legal nullity and useless dissipation of the judicial process.

The Decision below raises important questions relating to the administration of justice in the Federal courts and to the Federal judicial system, particularly in connection with the District Court's interpretation of its own power conferred by Section 1404(a) of Title 28.

II. The District Court Ignored the Statutory Requirements of 28 U.S.C. § 1404(a) in Ordering Transfer

The limited license permitted district courts in interpretation of the language of Section 1404(a) was emphasized in the *Hoffman* v. *Blaski* decision, *supra*.

> ". . . This Court has said, in a different context, that § 1404(a) is 'unambiguous, direct [and] clear,' *Ex parte Collett,* 337 U.S., at 58, and that 'the unequivocal words of § 1404(a) and the legislative history . . . [establish] that Congress indeed meant what it said.' . . ." (p. 343)

There the Court upheld this principle in the context of the particular statutory condition at issue. The Court said:

> ". . . But *the power of a District Court under § 1404 (a) to transfer an action to another district is made to depend not upon the wish or waiver of the defendant* but, rather, upon whether the transferee district was one in which the action 'might have been brought' by the plaintiff." (emphasis supplied) (pp. 343-344)

Subsequent to the decision in *Hoffman* v. *Blaski, supra,* lower courts have recognized the existence of three separate factors for determining whether transfer should be made. Each, however, has not been afforded equivalent significance.

The District Court for the District of Minnesota—the transferor Court in the instant case—in *Medtronic, Inc.* v. *American Optical Corporation,* 1971, 337 F. Supp. 490, 495, held:

> ". . . In making this determination § 1404(a) provides three factors which a court must consider:
>
> 1. The convenience of the parties;
> 2. The convenience of the witnesses; and
> 3. The interest of justice.
>
> Of these factors, 'the interest of justice' is the dominant factor and should be given the greatest weight by the courts."

The special significance afforded the third element does violence to the clear language of Section 1404(a) which requires first that the transfer be for the convenience of parties and witnesses, and also be in the interest of justice. Petitioners do not deny that the interest of justice is an important factor, but it is secondary to and conditional upon the existence of convenience to the parties and witnesses.

The Minnesota District Court in the instant case has extended its interpretation even further. Here it held, and the Court of Appeals for the Eighth Circuit agrees, that the statute prescribes the interest of justice* as a criteria which alone can justify transfer even when, as here, transfer is the cause of inconvenience to the parties.

In the *Medtronic* case, *supra,* the Court at least considered the elements of convenience to the parties and witnesses. It said:

> ". . . Concerning the first two factors in the instant case, each party has made various claims with regard to which forum would be more inconvenient to which party and its respective witnesses. Upon examining the arguments and the factors involved, however, the Court has concluded that in this regard the parties are in a state of virtual equipoise. It appears that the Massachusetts forum would be just as inconvenient to the plaintiff and its witnesses as

---

* Petitioners question the unfounded conclusion that transfer here will conserve judicial resources since if the transfer stands the disposition of this civil action will require the efforts of two courts often directed to similar and related issues. Similarly with respect to the assertions in the opinions of both courts below of the "possibility" of a quicker trial of the transferred claim. The moving party did not advance such a claim or offer any proof to support such speculation.

would the Minnesota forum to the defendant and its witnesses. It is therefore upon the third factor—the interest of justice—that the decision of whether or not to transfer this action must rest." (p. 495)

No such consideration was given here. Petitioners are Minnesota corporations with a principal place of business in Minnesota. Respondents are Delaware corporations having a principal place of business in Texas.

The Court's opinion makes no pronouncement as to convenience. The sole basis for transfer was the existence of prior litigation by Respondent, Weed Eater, Inc., against another Defendant involving the same patents, a factor considered pivotal in the context of the interest of justice.

Importantly, not all jurisdictions share this view as to the advantages to be derived through transfer to a jurisdiction in which there is pending prior litigation involving some of the same issues. In *Codex Corporation* v. *Milgo Electronic Corporation,* 553 F.2d 735 (1 Cir. 1977) the Court said:

"The first of these claims is that Kansas is the preferable forum because Milgo has already litigated the validity of its patents there in a suit against another party, United Utilities, Inc. While Milgo's past success makes its affection for Kansas understandable, the substance of this argument overlooks the fact that that litigation being largely completed, there is no possibility of consolidation or coordination to promote judicial economy. Nor has there been any showing the Judge Templar, who had the *United* case, and who is a senior judge, will accept a new, and what may well be a lengthy case.' However, if he will do so, although the presence of an 'educated judge' has been considered significant by some courts,

Union Carbide Corp. v. *Continental Oil Co.,* S.D.N.Y., 1971, 172 U.S.P.Q. 62; *Bell Industries* v. *Sidewinder Marine, Inc.,* E.D.Cal., 1973, 179 U.S. P.Q. 142, since it is possible that some economies will be achieved by proceeding before the same judge, there are two sides to this coin. While a judge who has already found a patent valid as against one defendant may not be disqualified from reconsidering the issue against another, *Denis* v. *Perfect Parts, Inc., D.Mass.,* 1956, 142 F.Supp. 263, (a case about which the writer has since had doubts), if he is the fact finder, and the factual issues are the same, it may be difficult for the district judge to give, or to feel he is giving, a new defendant a de novo, impartial consideration. See discussion in *O'Shea* v. *United States,* 1 Cir., 1974, 491 F.2d 774 at 778-79, and cases cited. We consider prior judicial experience in such a situation more a negative than an affirmative reason for transfer." (p. 739)

It is respectfully suggested that had Congress intended to make the conservation of judicial resources as sole criteria for the transfer of civil actions between districts, it could have easily so stated, constitutional considerations permitting. Instead, Congress enacted Section 1404 (a) in clear and unequivocal language permitting transfer only for the convenience of parties and witnesses and then only when the interest of justice would be served.

The importance of this question to the proper administration of justice in civil litigation in the Federal Courts can hardly be overstated. The District Court below and the Court of Appeals for the Eighth Circuit by its denial of the petition for the Writ of Mandamus of Petitioners are the only Courts to Petitioner's knowledge who have interpreted Section 1404(a) to permit transfer solely on the basis that it might conserve judicial resources. Should

that interpretation be permitted to stand, that statute could be employed as a method of redistributing the case load of the various district courts without regard to the convenience of the litigants and witnesses.

In addition this case presents other questions of first impression important to the administration of justice in the Federal Courts which require final determination and, hence, grant of the Petition for the Writ of Certiorari. See *Musician Federation* v. *Wittstein,* 379 U.S. 171, 175 (1964); *Schlagenhauf* v. *Holder,* 379 U.S. 104, 105 (1964).

III. Rule 21 F.R.C.P. Does Not Permit Severance For Purposes of Transfer of Multiple Claims Asserted Against a Party

Section 1404(a) limits the power of district courts to transfer only civil actions. "Civil Action" means the entire suit, not a part of the suit or one of several counts asserted against a party defendant. This is apparent from the Revisor's Note to the statute which points out that the words "civil action" were substituted for "suit" to conform the statute with Rule 2 of the Federal Rules of Civil Procedure. See Ex Parte Collett, 1949, 337 U.S. 55, 58.*

This issue is most sharply focused in the instant case where the transfer ordered was of one of multiple claims involving the same parties. Severance was purportedly made under the authority of Rule 42(b) of the Federal Rules of Civil Procedure, to effect the requested transfer.

---

* Significantly, the provision for transfers between divisions within a district (28 U.S.C. 1404(b) is not confined to "civil actions" but encompasses "any action, suit or processing of a civil nature or any motion or hearing thereof."

Claims also involving the same parties were retained. Instead of the single civil action contemplated by the Federal Rules of Civil Procedure there are now two cases which Petitioners will be required to prepare and try piecemeal in two separate jurisdictions before two different courts.

The situation is further aggravated by the existence of issues common to the severed and transferred claim and the retained claims. Fraudulent procurement of patents and illegal misuse of patents are issues equally applicable to the antitrust violations of the retained claims as well as a basis of invalidity and unenforceability of patents pleaded by the transferred claim. *Walker Process Equipment, Inc.* v. *Food Machinery & Chemical Corp.,* 1965, 382 U.S. 172.

The absence of authority under Section 1404(a) to transfer less than the entire civil action was recognized in *Wyndham Associates* v. *Bintliff,* 2 Cir., 1968, 398 F.2d 614, 618. The Court held that "this section (1404(a) of 28 U.S.C.) authorizes the transfer only of an entire action and not of individual claims." See also: *Anschell* v. *Sackheim,* D.C. N.J., 1956, 145 F.Supp. 447, 453; *Levin* v. *Mississippi River Corp.,* D.C. S.D.N.Y., 1968, 289 F. Supp. 353, 360.

The Court in *Wyndham Associates* also recognized that an action might consist of several separate actions, one or more of which might be "properly severed" under Rule 21, F.R.C.P. (398 F.2d at 618):

> ". . . Where certain claims are properly severed, the result is that there are then two or more separate 'actions', and the district court may, pursuant to § 1404(a), transfer certain of such separate actions while retaining jurisdiction of others."

In the present case, however, the Court below could not properly sever Count Four from the remaining counts. Severance, as provided for in Rule 21 of the Federal Rules of Civil Procedure, is confined to multiple party cases and is to be exercised only to resolve misjoinder and non-joinder problems. In *Wyndham Associates* (398 F.2d at 618) it was stated:

> ". . . a district court may properly sever *the claims against one or more defendants* for the purpose of permitting the transfer of *the action against the other defendants,* at least in cases where, as here, the defendants as to whom venue would not be proper in the transferee district are alleged to be only indirectly connected to the manipulations which form the main subject matter of the action . . ." (Emphasis added)

In this case there was no contention that Rule 21 came into play. Rather, Respondent argued, and apparently the District Court agreed, that Count Four should be "severed" under Rule 42(b) F.R.C.P. That rule, however, does not provide for severance; it only authorizes separate trials.

The distinction is important. Severance under Rule 21 results in two distinct civil actions and two distinct judgments. Separate trials only affect the timing of the trials or hearings of the various issues in one civil action.

> "Rule 42(b) allows the court to order a separate trial of any claim . . .or of any separate issue . . . The procedure authorized by Rule 42(b) should be distinguished from severance under Rule 21. Separate trials will usually result in one judgment, but severed claims become entirely independent actions to be tried, and judgment entered thereon, independently. Unfortunately this distinction, clear enough in theory, is often obscured in practice since at times the courts talk of 'separate trial' and 'severance' interchangeably." *Wright & Miller, Federal Practice and Procedure,* Civil §2387.

The District Court below ignored this distinction, erroneously treating Weed Eater's motion for a "severance" as one properly made under Rule 42(b).

Severance is permissible only under Rule 21 F.R.C.P. The Rule itself, as well as its placement within the Federal Rules, shows that its application is limited to problems arising from the joinder or misjoinder of parties.

The subject of Rule 21 is "Parties", the fourth topical heading of the Federal Rules of Civil Procedure. The rule preceding it, Rule 20, establishes the rules for the "Permissive Joinder of Parties". Rule 21 establishes the rules for dealing with problems of "Misjoinder and Non-joinder of Parties". The purpose of the Rule was to obviate or minimize the harsh results of misjoinder or non-joinder of parties under the common law. *Halliday* v. *Verschorv,* 8 Cir., 1967, 381 F.2d 100, 108; *Kerr* v. *Compagnie De Ultramar,* 2 Cir., 1958, 250 F.2d 860, 861. The severance provision of the rule provides district courts with an additional tool for resolving problems arising from the joinder of multiple parties in a single action. It does not by terms or placement within the plan of the Federal Rules confer on courts the unfettered power to sever any claim, as a reading of the entire rule might suggest.

Moreover, to read the final sentence of Rule 21 in a vacuum as authorizing the severance of any claim renders portions of Rule 42(b) redundant at the very least. Under Rule 42(b), a court can grant separate trials only if

there is a showing of "convenience or to avoid prejudice, or when separate trials will be conducive to expedition and economy." It is absurd to suggest that the Rules impose such a severe burden upon the district court before separate hearings can be held in a case before it while at the same time contending the existence of unbridled authority to sever a portion of a case for transfer to another jurisdiction.

The Rules are part of a unitary and orderly plan for the conduct of civil litigation and must be construed in the context of the entire plan.

> ". . . it is essential that we recognize that the Rules were intended to embody a unitary concept of efficient and meaningful judicial procedure, and that no single Rule can consequently be considered in a vacuum." *Nasser* v. *Isthmian Lines,* 2nd Cir., 1964, 331 F.2d 124, 127.

No rule is to be construed so as to render another superfluous or a nullity. See *Gangemi* v. v. *Moor,* D.C. Del., 1967, 268 F.Supp. 19, 21-22; *Westland Oil Co.* v. *Firestone Tire & Rubber Co.,* D.C. N.D., 1943, 3 F.R.D. 55.

The question of the extent of the authority to sever granted by Rule 21 is important. Especially so if it can be used as below to thwart the purpose of the Federal Rules of Civil Procedure to have all claims existing between parties determined in a single civil action.

CONCLUSION

For the reasons stated, this Petition for Certiorari should be granted.

Respectfully submitted,

JOHN W. HOFELDT
ROBERT V. JAMBOR
55 East Monroe Street
Suite 3614
Chicago, Illinois 60603

EUGENE M. WARLICH
ALAN I. SILVER
E-1500 First National Bank Bldg.
Saint Paul, Minnesota 55101
Counsel for Petitioner

APPENDIX

UNITED STATES DISTRICT COURT

DISTRICT OF MINNESOTA

FOURTH DIVISION

THE TORO COMPANY;
TORO SALES COMPANY,

Plaintiffs,

v. 4-77 Civ. 84

BALLAS LIQUIDATING COMPANY:
WEED EATER, INC., and
H. SPENCER STONE ASSOCIATES, INC.,

Defendants.

EUGENE M. WARLICH, Esq., ALAN I. SILVER, Esq., Doherty, Rumble & Butler, St. Paul, Minnesota, together with JOHN W. HOFELDT, Esq., and ROBERT V. JAMBOR, Esq., Haight, Hofeldt, Davis & Jambor, Chicago, Illinois, appeared for the plaintiffs.

JAMES B. LOKEN, Esq., Faegre & Benson, Minneapolis, Minnesota, together with EDWARD W. GOLDSTEIN, Esq., and RICHARD S. FAUST, Esq., Arnold, White & Burkee, Houston, Texas, appeared for the defendants.

MEMORANDUM ORDER

This case is presently before the court upon the motions of the defendants to dismiss for improper venue, inadequate service of process, and failure to state a claim, and to sever Count Four of the Second Amended Complaint and transfer it and the conditional counterclaim to the United States District Court for the District of Kansas.

This action arises out of the termination of certain branches of Toro Sales Co. as distributors of Weed Eater flexible line trimmers in the New York, Los Angeles, and San Francisco areas. Plaintiffs contend that these terminations violate certain provisions of the federal antitrust laws.

Plaintiff The Toro Company (Toro) is a corporation organized under the laws of Minnesota, which manufacures and sells in interstate commerce, lawnmowers, tractors, and other lawn and garden products. Plaintiff Toro Sales is a wholly owned corporate subsidiary of Toro, organized under the laws of the State of Minnesota, which sells products manufactured by Toro and by other manufacturers of lawn and garden products. Toro Sales operates through sales divisions which function as wholesale distributors selling lawn and garden products to retailers for resale to customers. It also distributes through independent distributors.

The corporate relationship between the defendants is more complex. Ballas Liquidating Company (Ballas) is a successor to Weed Eaters, Inc., which was originally incorporated in Texas in January of 1972. In January of 1976, Weed Eaters reincorporated in Delaware and changed its name to Weed Eater, Inc. For reasons that become apparent, this corporation shall also be referred to as Weed Eater I. From 1972 until March 1, 1977, Weed Eater I distributed and sold the WEED EATER line of products. On March 10, 1977, Weed Eater I changed its name to Ballas Liquidating Company.

In mid-1972, Weed Eater I contracted with H. Spencer Stone and Associates, Inc. d/b/a International Marketing Associates (I.M.A.), to market WEED EATER trimmers.

I.M.A. and its president, H. Spencer Stone, set up a distribution network of lawn and garden product distributors throughout the country, including the New York, Los Angeles, and San Francisco divisions of Toro Sales. From 1972 until mid-1976, I.M.A. continued to act as a marketing arm of the WEED EATER product. It was during this period that the New York division of Toro Sales was terminated. There is some dispute among the defendants as to who was responsible for the termination of this branch, I.M.A., or Weed Eater I.

Apparently, on March 1, 1977, one day before this suit was filed, Emerson Electric Company (Emerson), a Missouri corporation, purchased certain operating assets and assumed certain liabilities of Weed Eater I. That day, Emerson apparently transferred all of the acquired assets and liabilities of Weed Eater to Emerson's wholly-owned subsidiary, Florissant Garden Equipment (Florissant), a Delaware corporation that had been formed the previous day.

On March 2, 1977, plaintiffs sued Weed Eater, Inc., seeking treble damages and further seeking a preliminary and permanent injunction enjoining the defendant from refusing to deal and sell WEED EATER products to plaintiffs on reasonable and non-discriminatory terms and conditions.

On March 10, 1977, Weed Eater I, the Delaware corporation, changed its name to Ballas Liquidating Company. Ballas has adopted a plan of complete dissolution and liquidation and will be completely dissolved by March of 1978.

Florissant also changed its name on March 10, 1977 to Weed Eater, Inc. This company will hereafter be

referred to as Weed Eater II. Weed Eater II currently distributes its WEED EATER products through Larsen-Olsen Co. of Minneapolis.

Plaintiffs amended their complaint on April 8, 1977, to add Ballas and I.M.A. as defendants.

At the hearing of May 27, 1977, Ballas and I.M.A. argued that this action should be dismissed as against them because of improper venue and insufficient service of process.[1]

On June 10, 1977, plaintiffs were granted leave to file their second amended complaint, which alleges violations of Sections 1 and 2 of the Sherman Act, Section 3 of the Clayton Act, and seeks a declaratory judgment that two patents currently owned by Weed Eater II are invalid.

At the hearing of June 27, 1977, Weed Eater II argued that this action should be dismissed as against it due to ineffective service of process.[2]

---

[1] I.M.A. also moves to dismiss for failure to state a claim, F.R.Civ.P. 12(b)(6), and to transfer, 28 U.S.C. § 1404. Plaintiffs' allegations do state a claim against I.M.A. and thus I.M.A.'s Rule 12(b)(6) motion will be denied. I.M.A.'s motion to transfer will be denied as moot due to the court's disposition of its motion to dismiss for lack of personal jurisdiction.

[2] Weed Eater II also moves to dismiss for failure to state a claim. F.R.Civ.P. 12(b)(6). Weed Eater II contends that any antitrust violations were committed by Weed Easter I before Weed Eater II acquired the selected assets and assumed certain liabilities of Weed Eater I. It is Weed Easter's II's position that it did not assume any liability for any antitrust violation that may have occurred prior to March 1, 1977.

Plaintiffs contend that Weed Eater II is a successor to Weed Eater I and has also continued the antitrust

By agreement of counsel, Ballas' and I.M.A.'s motions to dismiss will be decided based upon the first amended complaint. Weed Eater II's motion to dismiss will be decided based upon the second amended complaint.

VENUE

Ballas and I.M.A. contend that this action must be dismissed because venue has been improperly placed in this district. In their first amended complaint, plaintiffs allege that venue is proper in this court under the special venue provision of Section 12 of the Clayton Act, 15 U.S.C. § 22, which places venue in the district in which a corporate defendant:

(a) is an inhabitant,
(b) may be found, or
(c) transacts business.

Plaintiffs do not contend that either Ballas or I.M.A. is an inhabitant of Minnesota, nor do plaintiffs contend these defendants may be found within this state. Rather, plaintiffs assert that these defendants transacted business within Minnesota and thus venue is proper here under Section 12.

Defendants Ballas and I.M.A. argue that Section 12 must be interpreted in light of the circumstances existing at the time the suit was commenced, *Sunbury Wire Rope*

---

[2] (Continued)
violations of Weed Eater I. The court finds both claims state a cause of action. *Cyr* v. *B. Offen & Co.*, 501 F.2d 1145 (1st Cir. 1974); *In re Master Key Antitrust Litigation*, 1977-1 C.C.H. ¶ 61,456 (D. Conn. Sept. 28, 1976). Thus Weed Eater II's motion to dismiss for failure to state a claim will be denied.

Mfg. Co. v. *U. S. Steel Corp.*, 230 F.2d 511 (3d Cir. 1956), and because neither was "transacting business" in Minnesota on March 2, 1977, the date this lawsuit was filed, venue is improper here as to each.

Toro responds that doing business for the purpose of venue under Section 12 must be determined from the time the cause of action accrued, rather than from the time the lawsuit was filed. *Eastland Construction Co.* v. *Keasbey and Mattison Co.*, 358 F.2d 777 (9th Cir. 1966); *Adams Dairy Co.* v. *National Dairy Products Co.*, 293 F. Supp. 1135 (W.D. Mo. 1968). Toro argues that the defendants' construction violates public policy since by withdrawing after inflicting an injury, a wrongdoer could force an innocent victim to travel to a distant jurisdiction to seek judicial redress.

The court finds it unnecessary to resolve this issue, because, as the plaintiffs assert, venue is proper in this district as to these defendants under the general venue statute of 28 U.S.C. § 1391(c). As Wright and Miller note:

> [T]he Clayton Act venue provisions are now far less important than they once were, and a nice parsing of them is not required, since the Supreme Court has held that special venue statutes are supplemented by, and to be read in the light of, liberalizing provisions of the general venue statutes, [*Pure Oil Co.* v. *Suarez*, 384 U.S. 202 (1966)] at least in the absence of contrary restrictive indications in the special venue statute. Since the Clayton Act has no contrary restrictive indications, and indeed was clearly broadening in its effect, it is now clear—although there had been doubt about this prior to the Supreme Court decision on the relation of special and general venue statutes—that the general statutes are applicable to antitrust cases. Wright, Miller & Cooper, Federal Practice and Procedure: Jurisdiction § 3818 at 108.

Section 1391(c) provides that a "corporation may be sued in any judicial district in which it is incorporated or licensed to do business or is doing business. . . ." In this Circuit, "the venue requirements of § 1391(c) are satisfied by showing that the defendant corporation was doing business in the district at the time the cause of action arose." *Farmers Elevator Mutual Insurance Co.* v. *Carl J. Austad & Sons, Inc.*, 343 F.2d 7, 12 (8th Cir. 1965). *Great American Insurance Co.* v. *Louis Lesser Enterprises Inc.*, 353 F.2d 997 (8th Cir. 1965). This court finds that Ballas, as Weed Eater I, and I.M.A. were doing business within this district at the time plaintiffs' cause of action accrued and thus the motions of these defendants to dismiss for improper venue will be denied.

SERVICE OF PROCESS

Each defendant argues that although plaintiffs' service of process under both of Minnesota's long arm statutes, Minn. Stat. §§ 543.19(1) and 303.13(1)(3), was mechanically proper, it was nevertheless ineffective as a matter of law.

Ballas and I.M.A. submit that since both of Minnesota's long arm statutes are written in the present tense, these statutes must be construed as of the present time. Because both corporations had ceased conducting business within Minnesota at the time this action was commenced, they argue they were not transacting business within the state within the meaning of § 543.19(1)(b) so as to afford effective service of process. This section provides that personal jurisdiction may be obtained over

any foreign corporation which "transacts any business within the state."

Ballas admits that it had conducted substantial business in Minnesota prior to March 1, 1977. Nevertheless, Ballas argues that on March 1, 1977, it ceased conducting business in Minnesota when it sold most of its corporate assets to Emerson and thus was not transacting business in Minnesota on March 2, 1977, the day the complaint was filed. I.M.A. makes a similar argument asserting that it ceased conducting business in Minnesota in mid-1976.

Plaintiffs contend that it is not necessary that they tie the grounds for jurisdiction to a specific provision in the long arm statutes because the Minnesota Supreme Court has declared that the statutes should be interpreted to extend the extraterritorial jurisdiction of the Minnesota courts to the maximum limits consistent with due process. *Mid-Continent Freight Lines* v. *Highway Trailer Industries,* 291 Minn. 251, 190 N.W.2d 670 (1971); *Hunt* v. *Nevada State Bank,* 285 Minn. 77, 172 N.W.2d 292 (1969), *cert. denied sub nom. Burke* v. *Hunt,* 397 U.S. 1010 (1970). Therefore, plaintiffs argue, "the court's primary concern under the statute should be to test [defendants'] contacts with this forum under due process standards." *Land O'Lakes, Inc.* v. *L. D. Schreiber Cheese Co. Inc.,* 4-75 Civ. 520 (D. Minn. April 14, 1976). *But see Shaffer* v. *Heitner,* ..... U.S. ..... (June 24, 1977) (Powell, J. *concurring*) [45 U.S.L.W. 4849, 4858].

The court finds that plaintiffs did obtain effective service of process on Ballas and I.M.A. under § 543.19 (1)(b). The Minnesota Supreme Court has indicated that the long arm statutes should be interpreted broadly to afford maximum protection of state residents and to

extend the jurisdiction of the Minnesota courts to the maximum reach permitted by due process. *Franklin Mfg. Co.* v. *Union Pacific R. Co., supra; Hunt* v. *Nevada State Bank, supra.* To achieve these purposes, Minn. Stat. §543.19 (1)(b) should be construed so as to include a corporation transacting business in Minnesota at the time the cause of action accrued. It is undisputed that Ballas and I.M.A. were transacting business in Minnesota when the Toro distribution branches were terminated. Therefore the defendants' activities fall within the statutory framework provided by § 543.19(1)(b). The fact that these defendants have ceased conducting business within the state will be taken into account in evaluating the quality and quantity of their contacts with this state to ensure the due process requirements for long arm jurisdiction under *Aftanase* v. *Economy Baler Co.,* 343 F.2d 187 (8th Cir. 1965), are met.

Ballas, I.M.A., and Weed Eater II argue that the language of § 543.19(1) requires that plaintiffs' cause of action arise from the acts enumerated in that statute for the service of process to be effectual. This section provides for personal jurisdiction over any foreign corporation "[a]s to a cause of action *arising from* any acts enumerated [herein]." (emphasis added) Defendants contend that since plaintiffs' cause of action arose out of the termination of Toro distributors in California and New York, which is unrelated to defendants' business contacts with Minnesota, service of process is ineffective.

However, the principal decision that the defendants cite in support of their proposition that there must be a nexus between plaintiffs' cause of action and defendants' acts in Minnesota, *Tunnell* v. *Doelger & Kirsten, Inc.,* 405 F. Supp. 1338 (D. Minn. 1976), has apparently been

eroded by the Minnesota Supreme Court in *Franklin Mfg. Co.* v. *Union Pacific Railroad Co.*, 297 Minn. 181, 210 N.W.2d 227 (1973); *Northwestern National Bank of St. Paul* v. *Kroll*, ... Minn. ....., 226 N.W.2d 910 (1976), and *Hardrive's, Inc.* v. *City of La Crosse*, ... Minn. ....., 240 N.W.2d 814 (1976). In each of these decisions the Minnesota Supreme Court has recognized that the existence of a nexus between plaintiffs' cause of action and defendants' contacts with Minnesota is not a jurisdictional prerequisite to long arm jurisdiction, but rather is only one factor to consider in determining whether due process is met.

DUE PROCESS

The primary factors which must be evaluated in determining whether jurisdiction over non-residents will comport with federal due process demands are (a) quantity of contacts with the forum state, (b) nature and quality of contacts with the forum state, (c) source and connection of the cause of action with those contacts, (d) interest of the state in providing a forum, and (e) convenience of the parties. *Aftanase* v. *Economy Baler Co.*, 343 F.2d 187 (8th Cir. 1965); *Mid-Continent Freight Lines, Inc.* v. *Highway Trailer Industries, Inc.*, 291 Minn. 251, 190 N.W.2d 670 (1971).

The court finds that the due process requirements of long arm jurisdiction are met with respect to both Weed Eater II and Ballas. Weed Eater II has done between $150,000 to $200,000 of business in Minnesota in its first two months of existence. Although plaintiffs' cause of action is unrelated to this defendant's contacts with Minnesota, the contacts of Weed Eater II with this state are substantial with respect to quantity and quality and therefore it is not essential that they also relate to the cause of action.[3] *Perkins* v. *Benquet Consolidate Min. Co.*, 342 U.S. 437 (1952); *Hardrives, Inc.* v. *City of La Crosse, supra.*

Similarly, before it changed its corporate name to Ballas, Weed Eater I conducted a substantial amount of business in Minnesota—$400,000 in sales in the years preceding this lawsuit and a majority of the $900,000 of orders for this season. This corporate entity cannot avoid the consequences of these contacts simply by changing its corporate name. Its cessation of business in this state one day before this suit was filed does not insulate it from this court's jurisdiction. Again, the defendant's contacts with the state are so substantial that the plaintiffs' cause of action need not arise out of them.

Finally, the court concludes that "traditional notions of fair play and substantial justice" are offended by the maintenance of this action against I.M.A. in this district. *International Shoe Co.* v. *Washington*, 326 U.S. 310, 316 (1945). While there is some evidence before the court that employees of I.M.A. made periodic visits to Minnesota between 1972 and mid-1976, nothing has been submitted that would support a finding that I.M.A. has been engaged in substantial, continuous, and systematic activity within the state of Minnesota. Indeed, I.M.A. ceased conducting any activity within this state one year ago when it terminated its business relationship with Weed Eater I. Thus the fact that there is no nexus between plaintiffs' cause of action and I.M.A.'s activities within the state become dispositive. It is unreasonable to require I.M.A. to defend

[3] The court finds that it is unnecessary to determine whether there is jurisdiction over Weed Eater II based upon Count IV of the Second Amended Complaint.

in Minnesota this action which arose out of the termination of New York and California Toro distributors where I.M.A.'s contacts with this state terminated one year ago and were not substantial. Thus I.M.A.'s mootion to dismiss for lack of jurisdiction will be granted.

SECTION 1404(a) TRANSFER

Weed Eater II moves pursuant to 28 U.S.C. § 1404(a) to sever and transfer to the United States District Court for the District of Kansas both Count Four of plaintiffs' second amended complaint and defendant Weed Eater II's conditional counterclaim. Count Four seeks a declaratory judgment that three patents currently owned by Weed Eater II, numbers 3,708,967 ('967), 3,826,068 ('068), and 3,859,776 ('776), are invalid. Weed Eater II's conditional counterclaim alleges infringement by plaintiff of two of the challenged patents, numbers '068 and '776.

Weed Easter II contends that the interests of justice would be served if Count Four were transferred to the District of Kansas for possible consolidation for discovery purposes with *Weed Eater, Inc.* v. *Allied Industries of Kansas, Inc.*, Civil 75-146-C2. In this Kansas action, Weed Eater II has alleged that Toro's manufacturer, Allied Industries of Kansas, Inc. (Allied), is infringing Weed Eater II's patents numbered '068 and '776 by making and selling flexible line vegetation cutting devices. Weed Eater II contends that judicial resources will be preserved and effective judicial administration promoted if Count Four of this action is transferred to Kansas for possible consolidation for discovery purposes with its action there involving the identical patents.

Toro responds that because it could not have been sued for patent infringement in Kansas under the special

patent venue statute, 28 U.S.C. § 1400(b), this declaratory judgment action for patent invalidity should not be transferred there. Judge Larson recognized this argument in *Medtronic, Inc.* v. *American Optical Co.*, 337 F. Supp. 490 (1971).

> [Plaintiff] contends that, since a declaratory judgment action for invalidity and noninfringment of a patent is really a patent infringement action in reverse, such a declaratory judgment action should not be transferred, over the plaintiff's objection, to a district in which the defendant could not have brought a patent infringement action against the plaintiff, regardless of the fact that plaintiff could have brought the declaratory judgment action in that district. *Id.* at 498.

Judge Larson also recognized, however, that venue in a declaratory judgment action alleging patent invalidity is controlled by the general venue provision of § 1391(c) and not the special venue provision of § 1400(b). *General Tire & Rubber Co.* v. *Watkins*, 326 F.2d 926 (4th Cir.), *cert. denied*, 377 U.S. 909 (1964); *Minnesota Automotive, Inc.* v. *Stromberg Hydrolic Brake & Coupling Co.*, 309 F. Supp. 614 (D. Minn. 1970). Thus even under *Medtronics* it is only a matter of judicial discretion that might prevent the transfer of a declaratory judgment action for patent invalidity to a district where it might have been brought under the general venue provision of § 1391(c).

In the opinion of this court, a transfer is necessary on these facts. Not only will judicial resources be preserved and judicial administration be promoted by such a transfer, but is quite possible that the parties will obtain an earlier trial date in the United States District Court for the District of Kansas. Thus Weed Eater

II's motion to transfer Count Four and its conditional counterclaim will be granted. In so doing, however, the court expresses no opinion regarding the merits or propriety of either Count Four or the conditional counterclaim.

Upon the foregoing,

It Is Ordered That the motions of Weed Eater, Inc. and Ballas Liquidating Company to dismiss be and the same are hereby in all respects denied.

It Is Further Ordered That the motion of H. Spencer Stone and Associates, Inc. to dismiss for lack of personal jurisdiction be and the same is hereby granted.

It Is Further Ordered That inasmuch as there is no just reason for delay, the clerk is directed to enter judgment dismissing H. Spencer Stone and Associates, Inc. for the lack of personal jurisdiction.

It Is Further Ordered That Weed Eater II's motion to sever Count Four of plaintiffs' second amended complaint and transfer it and Weed Eater II's conditional counterclaim to the United States District Court for the District of Kansas be and the same is hereby granted.

It Is Further Ordered That the clerk is directed to transfer Count Four of plaintiffis' second amended complaint and Weed Eater II's conditional counterclaim to the United States District Court for the District of Kansas.

Dated: July 15, 1977.

/s/ Donald D. Alsop
Donald D. Alsop
United States District Court

UNITED STATES DISTRICT COURT
District of Minnesota
Fourth Division

The Toro company; Toro Sales Company,

Plaintiffs,

v.

Ballas Liquidating Company; Weed Eater,, Inc.; and H. Spencer Stone Associates, Inc.,

Defendants.

4-77 Civil 84

ORDER

The above-entitled matter came on before the undersigned, one of the Judges of the above-named Court, on August 26, 1977, upon plaintiffs' motion to supplement the Court's Memorandum Order of July 15, 1977, to include the statutory language with respect to certification to the United States Court of Appeals for the Eight Circuit pursuant to 28 U.S.C. §1292(b).

John W. Hofeldt, Esq. and Robert V. Jambor, Esq. of Haight, Hofeldt, Davis & Jambor and Alan I. Silver, Esq. of Doherty, Rumble & Butler appeared for and on behalf of plaintiffs in support of said motion. Edward W. Goldstein, Esq. of Arnold, White & Durkee and James B. Loken, Esq. of Faegre & Benson appeared for and on behalf of defendant Weed Eater, Inc. in opposition thereto.

The Court having heard the arguments of counsel and having read the memoranda submitted, and on all the files, records and proceedings herein, and the Court being otherwise fully advised in the premises,

It Is Hereby Ordered:

1. That plaintiffs' motion to reconsider the Court's Memorandum Order of July 15, 1977, is hereby denied.

2. That plaintiffs' motion to supplement the Court's Memorandum Order of July 15, 1977, to include certification to the United States Court of Appeals for the Eighth Circuit pursuant to 28 U.S.C. §1292(b) is hereby denied.

3. That the Clerk of Court is hereby directed to transfer Count IV of plaintiffs' Second Amended Complaint to the United States District Court for the District of Kansas in accordance with this Court's Memorandum Order of July 15, 1977.

Dated: September 2, 1977.

By The Court:
/s/ Donald D. Alsop
United States District Judge

UNITED STATES COURT OF APPEALS
For The Eighth Circuit

No. 77-1685

The Toro Company, Toro Sales Company,
Petitioners,

v.

The Honorable Donald D. Alsop, District Judge, Ballas Liquidating Company, and Weed Eater, Inc.,
Respondents.

Original Petition for A Writ of Mandamus.
Submitted: November 4, 1977
Filed: November 10, 1977

Before BRIGHT, WEBSTER and HENLEY, Circuit Judges.
PER CURIAM.

This is an original petition for a writ of mandamus tendered by two Minnesota corporations, The Toro Company and its wholly owned subsdiary, Toro Sales Company. Respondents are The Honorable Donald D. Alsop, one of the judges of the United States District Court for the District of Minnesota, Ballas Liquidating Company and Weed Eater, Inc. Petitioners are the plaintiffs in what is basically an antitrust suit that is pending on Judge Alsop's docket, and the other respondents are defendants in that case.[1] The purpose of the petition is to set aside by means of mandamus an order of Judge Alsop severing Count 4 of petitioners' second amended complaint from the other counts and transferring the severed count to the United States District Court for

[1] The style of the case is The Toro Company, et al. v. Ballas Liquidating Company, et al., Docket No. 4-77 Civil 84.

the District of Kansas for possible limited consolidation with one or more patent infringement suits now pending in that district. Petitioners claim that the challenged order of the district court was beyond its power to enter, and that in any event the action of that court amounted to such an abuse of discretion as to be reviewable at this time by means of mandamus. Jurisdiction is predicated upon 28 U.S.C. § 1651(a), which is commonly referred to as the "all writs" section of the Judicial Code. Respondents contend that the petition should be dismissed summarily.

Petitioners and respondents, other than Judge Alsop, are engaged in the manufacture and sale of lawn and garden equipment such as small tractors, lawnmowers, edgers, and trimmers. Both are competitors and both are engaged in interstate commerce. Petitioner's products are sold under the brand name "Toro," and respondent's products are sold under the brand name "Weed Eater." The present respondent, Weed Eater, Inc., is sometimes referred to as Weed Eater II because in its corporate family tree there was an earlier Weed Eater, Inc. which is referred to as Weed Eater I. With the passage of time Weed Eater I acquired certain patents on lawn trimming devices, and those patents, including the right to sue for past infringements, are now owned by Weed Eater II.

In 1975 Weed Eater I, which was still operational, filed a patent infringement suit in federal court in Kansas against Allied Industries of Kansas, Inc., which was manufacturing trimmers to be sold under the Toro name. Another infringement suit filed by Weed Eater I in another district has been transferred to Kansas at least

for discovery purposes. As indicated, Weed Eater II is a successor to Weed Eater I.

Petitioners' suit in Minnesota was filed in early March, 1977, and the complaint was amended twice. The second amended complaint, hereinafter called simply the complaint, was filed in June and contained four counts. The first three counts charged violations of §§ 1 and 2 of the Sherman Antitrust Act and of § 3 of the Clayton Act. Treble damages and injunctive relief were sought. It was claimed, among other things, that the defendants were using the Weed Eater patents unlawfully as tools to further their violations of the antitrust laws.

Count 4 of the complaint charged that the Weed Eater patents are invalid, unenforceable and not infringed, and prayed a declaratory judgment to that effect. When the complaint was filed Weed Eater II filed a counterclaim addressed to Count 4 and claiming damages for infringement.[2] Obviously, the patent issues tendered by Count 4 of the complaint and by the counterclaim addressed to that count are embraced, at least in large measure, in the patent case pending in Kansas.

Weed Eater II moved to sever Count 4 of the complaint from the other counts and to transfer Count 4 and its own counterclaim to Kansas for possible consolidation with the earlier case for purposes of discovery if not for other purposes as well. The motion was opposed by petitioners.

---

[2] The counterclaim was conditioned upon a determination by the district court that venue of petitioners' suit was proper and that the district court had jurisdiction of the corporate person of Weed Eater II; the district court so held.

In July, 1977 the district court filed a Memorandum Order and granted Weed Eater's motion. The district court was evidently of the view that it had the authority to sever Count 4 and to transfer that count and the counterclaim to Kansas pursuant to 28 U.S.C. § 1404(a)[3]

As to the propriety of the transfer, the district court found that it would conserve judicial resurces and would promote judicial administration; the district court also found that there was a possibility that the patent issues raised in Count 4 would be tried more speedily in Kansas than in Minnesota.

In August the district court refused to reconsider its holding and also refused to certify under 28 U.S.C. § 1292(b) that the question presented by the transfer motion would be appropriate for our consideration in an interlocutory appeal.

The instant petition was promptly filed and on September 2, 1977 a member of the administrative panel of this court granted a stay of the district court's order. A response was called for, filed and later supplemented.[4] The matter has been submitted to us on the petition, the response as supplemented, exhibits tendered by the respective parties and memorandum briefs.

---

[3] Section 1404(a) provides that for the "convenience of the parties and of witnesses, in the interest of justice" a district court may transfer a civil action to any other district in which it might have been brought.

[4] The response was filed on behalf of all three respondents by counsel for the defendants in the Minnesota case. It stated that dismissal of the petition was sought under the first sentence of Fed. R. App. P. 21(b), and that the response was not to be considered as an "answer" contemplated by the second sentence of that rule.

This court has never looked with favor on the use by a disappointed litigant of the extraordinary writ of mandamus to secure an interlocutory review of an order entered pursuant to §1404(a). And for a number of years following our decision in *Great Northern Ry.* v. *Hyde,* 238 F.2d 852 (8th Cir. 1956), *adhered to by a divided court on rehearing,* 245 F.2d 537 (8th Cir.), *cert. denied,* 355 U.S. 872 (1957), the rule in this circuit was that the writs of mandamus and prohibition were available in transfer context only if the district court had ordered or was about to order transfer of a case to a district in which it could not have been brought originally. However, in *McGraw-Edison Co.* v. *Van Pelt, District Judge,* 350 F.2d 361 (8th Cir. 1965), we extended the scope of interlocutory review so as to permit an inquiry as to "whether the district court's action under § 1404(a) was shown to be without any possible basis for judgment of discretion, so as legally to involve abuse of judicial power and responsibility." 350 F.2d at 363. We said:

> In thus making examination of whether the district court's action under § 1404(a) has been arbitrary, these cases have not opened the door to any loose issuance of a writ. All of them have expressly or by implication emphasized the narrow range of scrutiny which is involved and the traditional restraint which always must be exercised by an appellate court in relation to the issuance of any writ. The only relief which a party will be permitted to seek in such a situation is against manifest judicial arbitrariness. Unless it is made clearly to appear that the facts and circumstances are without any basis for a judgment of discretion, the appellate court will not proceed further to examine the district court's action in the situation. If the facts and circumstances are rationally capable of providing reasons for what the district

> court has done, its judgment based on those reasons will not be reviewed. Chemetron Corporation v. Perry, 295 F.2d 703, 704 (7 Cir. 1961). Where basis exists for judgment of discretion, the appellate court may not substitute its own discretion for that of the district court. General Casualty Company v. Grubb, 253 F.2d 51, 53 (7 Cir. 1958).

350 F.2d at 363.

The scope of review defined in *McGraw-Edison* was recently recognized by us in *Caleshu* v. *Wangelin, District Judge,* 549 F.2d 93, 96 (8th Cir. 1977). *See also Wilkins* v. *Erickson,* 484 F.2d 969, 991 (8th Cir. 1973).

We have given careful consideration to the materials before us, and we are satisfied that in view of the provisions of Fed. R. Civ. P. 21 the district court had the power to sever Count 4 of the complaint from the other counts and to transfer Count 4 and the counterclaim to Kansas pursuant to § 1404(a). *See Wyndham Associates* v. *Bintliff,* 398 F.2d 614 (2d Cir.), *cert. denied,* 393 U.S. 977 (1968); 3A Moore's Federal Practice, 2d ed., ¶ 21.05 (2); 7 Wright & Miller, Federal Practice & Procedure, § 1689. And we are also satisfied that the action taken by the district court was not so impermissible, unreasonable or arbitrary as to call upon us to disturb it in this proceeding.

Accordingly, the petition is denied.

A true copy.

Attest:

Clerk, U. S. Court of Appeals, Eighth Circuit.